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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE MAINE CENTRAL RAILROAD COMPANY AND
THE PORTLAND TERMINAL COMPANY,

Petitioners,

—v.—

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES AND
THE NATIONAL MEDIATION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented for Review

1. Whether an act of Congress that intentionally imposes unique, retroactive burdens solely upon a single individual violates the equal protection and due process components of the Fifth Amendment?

2. Whether an act of Congress that adjudicates the rights of private parties in a particular dispute violates the doctrine of separation of powers?

Statement Pursuant to Rule 28.1

Petitioners the Maine Central Railroad Company and the Portland Terminal Company are each wholly-owned subsidiaries of Guilford Transportation Industries, Inc. Petitioners' subsidiaries and affiliates, apart from wholly-owned subsidiaries, are:

Albany Port Railroad Corporation
Albany & Vermont Railroad Company
Blackstone River Estates
Boston Lights, Inc.
Boston and Maine Corporation
Cheshire Bridge Corporation
Delaware and Hudson Railway Company
Delaware River Estates, Inc.
Downtown Development Associates
Eastern Lights, LTD.
Green Island Estates, Inc.
Greenwich & Johnsonville Railway Co.
Guilford Aviation, Inc.
Guilford Motor Express, Inc.
Hudson River Estates, Inc.
Kennebec River Estates, Inc.
Kennebec Water-Front Estates, Inc.
Merrimack River Estates, Inc.
Napierville Jct. Railway Company
Northern Coal & Iron Co.
Northern Lights, LTD.
Northern New York Development Company
Northern Railroad Co.
Railstar Control Technology, Inc.
Pine Tree Corporation
Plattsburgh Estates, Inc.
Portland Cargo Associates
Railstar Control Technology, Inc.
Saratoga & Schenectady Railroad Company
Springfield Terminal Railway Company
Stony Brook Railroad Corporation
Two Rivers, Inc.
Vermont & Massachusetts Railway Company
Wilkes-Barre Connecting Railroad Co.
Wyoming Valley Improvement Co.

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Opinion in The Court Below

The opinion of the United States Court of Appeals for the First Circuit appears at 835 F.2d 368 and is reproduced as Appendix A. The opinion of the United States District Court for the District of Maine appears at 657 F. Supp. 971 and is reproduced as Appendix B.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the First Circuit were entered on December 11, 1987. This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Amendment V

No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The statute involved is Public Law No. 99-431, 100 Stat. 987 (Sept. 30, 1986). It is reproduced at A-12 - A-14 in Appendix A.

Statement of the Case

This is a case in which Congress has passed special legislation imposing severe burdens on a single named individual in order to prevent another person from unilaterally exercising a Congressionally-guaranteed right to harm unrelated third persons. In September 1986, Congress passed a law against a single, small Maine railroad, exacting unprecedented labor payments from the Railroad for the benefit of a national labor organization in order to satisfy that organization's demands and appease its threat to strike every other railroad across the country. Pub. L. No. 99-431, 100 Stat. 987 (Sept. 30, 1986) (the "Act"). On March 31, 1987 the United States District Court for the District of Maine upheld the constitutionality of the Act, and on December 11, 1987 the United States Court of Appeals for the First Circuit affirmed the judgment of the district court. *Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 835 F.2d 368 (1st Cir. 1987). Petitioners request that this Court grant review to determine the constitutionality of this novel exercise of Congressional power.

This case arises out of an isolated labor dispute between the Maine Central Railroad Company and its wholly-owned subsidiary the Portland Terminal Company (collectively, the "Railroad"), a small Maine railroad, and the Brotherhood of Maintenance of Way Employees (the "Organization"), a national railway labor union representing 65 of the Railroad's then-active employees and over 50,000 railroad employees nationwide. In 1984, the Organization began the dispute by demanding lifetime employment guarantees and "protection payments" for those employees represented by the Organization. The Railroad had never provided this kind of labor protection to those employees, and it refused to agree to the Organization's demands.

On March 3, 1986 the Organization began a strike against the Railroad. That same day, the Railroad, exercising its right to self-help, promulgated new work rules and rates of pay applicable to its employees represented by the Organization. Initially, the Organization struck only the Railroad, but in late March 1986 the Organization extended the strike to two other small railroads operated by the Railroad's parent company. In April 1986 the Organization extended the strike further to include secondary picketing of other, unrelated railroads as far away as Chicago and Los Angeles. In connection with the Organization's secondary picketing of unrelated railroads, this Court recently held that Congress has expressly permitted unlimited secondary picketing in any railway labor dispute in America. *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

The Organization's strike severely affected the Railroad, causing large losses and a significant reduction in traffic. In April 1986 the Railroad abolished over 200 jobs, including some jobs that had been filled by members of the Organization before the strike. On July 21, 1986, the district court approved the abolishment of over 200 jobs on the basis of demonstrated economic need. Because of these job abolishments, the number of active employees represented by the Organization was reduced from approximately 101 as of March 3, 1986, to approximately 65. At the time of these job abolishments, neither existing law nor the Railroad's collective bargaining agreement with the Organization required the Railroad to compensate anyone on account of these job abolishments, and Congress passed no legislation requiring compensation.

After the Organization extended its strike to include picketing of unrelated carriers, the National Mediation Board (the "NMB") determined that the Organization's secondary picketing threatened to disrupt rail traffic beyond the Railroad, and the NMB requested the President to appoint an Emergency Board, pursuant to the Railway Labor Act (the "RLA"), 45 U.S.C. §§ 150, et seq. Accordingly, on May 16, 1986, the President appointed Emergency Board 209 (the "Board") to investigate and report on the labor dispute between the Railroad and the Organization. Under the RLA, the appointment of the Board triggered a "cooling off" period during which neither the Railroad nor the Organization could resort to self-help until thirty days after the Board issued its report on June 20, 1986. The

Board's report contained certain recommendations,[1] but no agreement was reached between the parties. As a matter of law, the Board's report was not binding at the time it was issued, nor does the RLA provide any procedure by which it could ever become binding.

The "cooling off" period imposed by the appointment of the Board expired on July 20, 1986. Although free to resume its strike against the Railroad, the Organization never again did so. When on August 6, 1986, the Railroad promulgated again the March 3 work rules and rates of pay, no strike occurred.

Congress nevertheless passed an act extending the RLA's statutory cooling-off period. Pub. L. No. 99-385, 100 Stat. 819 (Aug. 21, 1986). The circuit court rejected the Railroad's challenge to that act. *Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484 (1st Cir.), *cert. denied*, 108 S. Ct. 91 (1987) [hereinafter cited as "*Maine Central I*"]. When this Congressionally-imposed cooling-off period expired on September 18, 1986, the Railroad again promulgated the March 3 work rules and rates of pay, and the Organization again acquiesced without any strike or resort to self-help.

1. The Act

The Act became law on September 30, 1986. It enacted the June 20, 1986 report of Emergency Board 209 and directed the NMB to appoint a single arbitrator to decide any "unresolved implementing issues." A-13 - A-14 On October 30, 1986 the NMB's arbitrator issued an award under the Act requiring the Railroad, among other things, to pay retroactively $1,222,000 in "protection payments" to employees represented by the Organization whose jobs the Railroad abolished during the strike due to economic need, and $241,095 in back pay retroactive to December 1, 1985.

It is undisputed that no other railroad in America, and none of the hundreds of other active railway labor disputes, is affected by the

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[1] The Board's recommendations are reproduced in the district court's opinion. *See* 657 F. Supp. at 974 (B-3 - B-4).

Act. No other railroad in America is required to make any such protection payments to any of its employees represented by the Organization.[2] Congress has never before imposed protection payments in any railway labor dispute, or passed laws affecting a labor dispute involving only one railroad.

The Act is very different from the previous act. The previous act extended for 60 days the statutory cooling-off period in the dispute between the Railroad and the Organization until September 18, 1986. The Act, however, does not extend or create any cooling-off period. It is undisputed that the Act makes specific and drastic changes in the Railroad's business: the Act will cost the Railroad over $3,500,000 more than under the rates of pay, rules, and working conditions promulgated and in effect on March 3, 1986; almost $2,200,000 more than under its previous collective bargaining agreement with the Organization; and over $1,650,000 more than if the Railroad were a party to the BMWE National Agreement. Because the Act imposes costly, retroactive protection payments in addition to the increased labor rates provided by the BMWE National Agreement — which Agreement does not provide for any protection payments in the rest of the industry — it is the single most expensive labor contract of its kind in the country. The following table illustrates the increased cost of the Act to the Railroad:

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[2] In fact, no other railroad has to pay any protection payments to employees represented by the Organization. It is undisputed that the present collective bargaining agreement ratified in October 1986 between the Organization and virtually every other rail carrier in America (the "BMWE National Agreement"), and to which the Railroad is not a party, does not provide for such payments. To the contrary, Presidential Emergency Board 211, which on August 14, 1986 reported on the events leading up to the BMWE National Agreement, rejected the Organization's demand for increased labor protection similar to that imposed on the Railroad by the Act:

> We have considered the Organization's contentions, but we are not persuaded that expanded protection is warranted. Additional expensive protection would detract from the cost containment efforts the railroad industry is undertaking to compete in the marketplace. The trucking industry is not layered with protection agreements and this places the truckers in a more advantageous position when competing with railroads.

	Railroad Promulgation	Previous Contract	BMWE National	Public Law 99-431
WAGES				
85 Equivalent year-round positions with 8% Overtime				
Back-pay 12/01/85 to 09/30/86	$ 0	$ 0	$ 38,600	$ 38,600
10/01/86 to 12/31/86	496,944	621,180	635,426	635,426
01/01/87 to 12/31/87	1,987,776	2,484,720	2,584,937	2,584,937
01/01/88 to 06/30/88	993,888	1,242,360	1,318,889	1,318,889
Lump sum payments	0	0	202,495	202,495
Total Wages and Lump Sums	3,478,608	4,348,260	4,780,347	4,780,347
Protection Payments (47 @ $26,000)	0	0	0	1,222,000
Production Gangs	0	0	0	89,625
Outfit Cars	(30,000)	0	0	0
Total Payroll Items	3,448,608	4,348,260	4,780,347	6,091,972
PAYROLL TAXES @ 26%	896,638	1,130,548	1,242,890	1,583,913
HEALTH & WELFARE				
$250/mo for 1986	31,875	63,750	63,750	63,750
$275/mo for 1987	140,250	280,500	280,500	280,500
$300/mo for 1988	76,500	153,000	153,000	153,000
Total Health & Welfare	248,625	497,250	497,250	497,250
TOTAL COST—10/01/86 to 06/30/88	$4,593,871	$5,976,058	$6,520,487	$8,173,135

2. The Legislative History of the Act

It is undisputed that the Act is the result of a Congressional lobbying campaign by the Organization, which represents approximately 50,000 railroad employees across the country. Without committee hearings, without debate, and without a recorded vote in either the House or Senate, the Act passed rapidly through Congress, before the bill was printed and available to any member of Congress, and even before the seven-page House Report was published.

The Act is unprecedented. In the sixty-year history of the American railroad industry since the RLA, Congress has never passed laws affecting a labor dispute involving only one railroad, except for the Act and the previous special act, outside the federal intervention into the Penn Central bankruptcy and the subsequent creation and federal ownership of Conrail. Of the handful of laws passed by Congress regarding railway labor disputes, each has addressed a national labor dispute involving numerous railroads across the country and national railway labor organizations. In only a single instance has Congress ever imposed binding arbitration in a national labor dispute and, until the Act, Congress had never imposed protection payments in connection with any railway labor dispute.

The Act does not apply to any other similarly situated labor dispute. At the time this action was begun, there were many other pending railway labor disputes that may lead to secondary picketing and a threatened shut-down of the nation's railroads — including the nation's airlines, which are subject to most provisions of the RLA. According to the NMB, there were well over thirty other railway labor disputes which had reached the self-help stage, as well as four airline labor disputes. There were even more disputes which may soon reach the self-help stage. According to the NMB, there were well over 300 active labor disputes docketed with the NMB and still other labor disputes in which the NMB has proffered arbitration. Any one of these disputes could result in a strike and secondary picketing.

Reasons for Granting the Writ

1. The Importance of the Question

This case presents fundamental constitutional questions involving basic precepts of a democratic society. At issue is the power of Congress to pass special legislation against a single individual and impose unique, discriminatory burdens on that individual alone.

Special legislation is a radical departure from our constitutional heritage. Special legislation is inherently discriminatory, and necessarily reflects a naked political preference against one person in favor of others. Nothing is more dangerous than raw legislative power exercised against a single individual. Nothing is more deserving of close judicial scrutiny than legislation against isolated and politically powerless individuals. Unless restrained by this Court, there is no logical barrier to special legislation further encroaching and descending upon any disfavored citizen or entity.

In the last 200 years, Congress has rarely passed special legislation against, or imposed discriminatory burdens on specific individuals. Congress normally adheres to Chief Justice Marshall's statement that:

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810); *accord United States v. Brown*, 381 U.S. 437, 446 (1965). While Congress occasionally passes "private bills," these laws nearly always benefit some particular person, and the detriment, if any, is shared by the general public. *See* Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1687 (1966). But, in recent years Congress has with increasing frequency passed special legislation affecting only a few named individuals and significantly altering the rights and liabilities of these individuals. Congress has recently done so at least three times in the railroad industry alone: the two bills directed at the Railroad; and one at the Long Island Railroad, Pub. L. No. 100-2, 101 Stat. 4 (Jan. 28, 1987). The Congressional proponents of the Long Island Railroad statute specifically cited as a precedent for that statute the legislation at issue in this case. *See* 133 Cong. Rec. H395-97 (daily

ed. Jan. 27, 1987); 133 Cong. Rec. S1186-87 (daily ed. Jan. 27, 1987). In light of this Court's decision in *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987), it is likely that, unless Congress passes general legislation restricting secondary picketing in the American railroad industry (and no such legislation is pending), Congress will pass special legislation in any of the hundreds of active labor disputes pending in the railroad or airline industry. Since the lower courts have taken divergent approaches with respect to the issue of special legislation, *compare Maine Central I*, 813 F.2d at 488-91 (applying minimum rationality test to legislation that imposed economic burdens on a single named entity) *with Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 409-25 (N.D.N.Y. 1987) (concluding that heightened scrutiny must apply to such legislation), *appeal docketed*, No. 87-7759 (2d Cir.), guidance from this Court is necessary to control this dangerous practice.

2. The Conflict with Applicable Decisions of this Court

A. *Equal Protection*

The nature of special legislation requires heightened scrutiny under the equal protection component of the Fifth Amendment. Special legislation implicates different constitutional concerns than general legislation. As this Court's cases have repeatedly held, the "rational basis test" is rooted in the presumption that the political process will operate to correct unwise or improvident general legislation. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (stating that the rational basis test "presumes that even improvident decisions will eventually be rectified by the democratic processes"); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (relying upon "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" for the presumption of constitutionality of statutes).

This model simply does not work in the case of special legislation. The political protections that justify the rational basis test evaporate when Congress selects a single person for adverse treatment. As Justice Jackson has observed:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the

> principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).[3] Similarly, relying on Justice Jackson's concurrence, the district court for the Northern District of New York recently noted that

> if the legislature errs in matching means with ends and its error affects everyone equally, the normal operation of the political process will in time correct the mistake. If the error only affects a minority singled out by the legislature, however, it is far less certain that the democratic process will remedy possible injustices, particularly when an unpopular minority is affected.

Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 421 (N.D.N.Y. 1987) (citations omitted), *appeal docketed*, No. 87-7759 (2d Cir.); *see also Ervine's Appeal*, 16 Pa. 256, 268 (1851) ("[W]hen individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?"); J. Choper, *Judicial Review and the National Political Process* 69 (1980) ("The smaller the allegedly aggrieved group and the more intense the felt need . . . of the majority, the greater the necessity of judicial review for the preservation of personal liberty.").

In the absence of political protection, the rational basis test is reduced to an absurdity. Congress has sweeping power to regulate interstate commerce and little, if any, economic activity falls outside its reach. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). Without the meaningful

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[3] This Court has frequently relied upon Justice Jackson's insight. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983); *Larson v. Valente*, 456 U.S. 228, 245-46 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

political protection against arbitrary action provided by generality in legislation, or meaningful judicial protection provided by heightened scrutiny, there is little that Congress could not do to disfavored individuals under the credible guise of regulating interstate commerce. For example, without these protections, nothing would prevent Congress from, as has happened here, passing legislation dictating the specific labor rates or prices of only particular companies, and not their competitors, which may well "rationally relate" to Congress's broad power to regulate interstate commerce. *Cf. Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985) (rejecting the argument that "*any* discrimination . . . could be justified simply on the ground that it favored one group at the expense of another") (emphasis in original).[4]

The few cases of this Court that have examined special legislation singling out particular individuals for burdensome treatment support the application of heightened scrutiny to such laws, and conflict with the decision of the court of appeals below. In *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901), the Court invalidated a Kansas statute because it applied "only to the Kansas City Stock Yards Company, and not to any other companies or corporations engaged in like business in Kansas . . . ." 183 U.S. at 114-15 (Harlan, J.). Likewise, in *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916) (Holmes, J.), a unanimous Court held unconstitutional a Louisiana statute that the legislature clearly directed at a single company. The Court found that "the plaintiff is the only one to whom the act could apply and . . . the statute was passed in view of the plaintiff's conduct, to meet it." *Id.* at 85. The Court noted that "[t]he statute bristles with severities that touch the plaintiff

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[4] This Court's cases establish the proposition that special legislation is inherently suspect because special legislation is the paradigm of naked political preferences. As this Court observed in *Hurtado v. California*, 110 U.S. 516 (1884):

> It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case . . . and thus exclud[es], as not due process of law . . . acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.

Id. at 535-36; *see also Leeper v. Texas*, 139 U.S. 462, 468 (1891).

alone" and that "a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice . . . ." *Id.* at 86.

The proposition that heightened scrutiny must apply to special legislation finds strong support in the Constitution's pervasive concern with special legislation. For example, the bill of attainder clause, U.S. Const. art. I, § 9, cl. 3, bars "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). The *ex post facto* clause, U.S. Const. art. I, § 9, cl. 3, "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The takings clause, U.S. Const. amend. V, prevents the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The uniformity provision of the bankruptcy clause, U.S. Const. art. I, § 8, cl. 4, "prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of one named debtor." *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982). The contracts clause, U.S. Const., art. I, § 10, cl. 1, prevents state governments from substantially impairing the obligation of contracts, especially to benefit "special interests" at the expense of "specific" or "particular" persons. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 n.13 (1983).[5] Thus, the constitutional concern with special legislation is, if anything, *more* textually demonstrable than, for example,

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[5] The prohibition of special legislation is so deeply ingrained in the American constitutional tradition that it is reflected in one form or another in the constitutions of most states. *See, e.g.*, Texas Const., art. 3, § 56 (prohibiting special legislation in cases that could be governed by general legislation). As the Supreme Court of Texas stated

> The purpose of this constitutional inhibition against the enactment of local or special laws is a wholesome one. It is intended to prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible. It is said that at an early period in many of the states the practice of enacting special and local laws became "an efficient means for the easy enactment of laws for the advancement of personal rather than public interests, and encouraged the reprehensible practice of trading and 'logrolling.'" It was for the suppression of such practices that such a provision was adopted in this and many of the other states of the Union.

Miller v. County of El Paso, 136 Tex. 370, 373-74, 150 S.W.2d 1000, 1001 (1941).

the concern with gender-based or illegitimacy-based classifications, or with legislation that burdens the right to travel, each of which has been recognized as triggering heightened judicial scrutiny.[6]

Despite this Court's clearly expressed concerns with special legislation, the court of appeals below held that the minimal rationality test applied to such legislation. The court of appeals felt restrained from applying heightened scrutiny by its decision in *Maine Central I*, which had relied on this Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), and *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U.S. 387 (1927). However, none of this Court's cases stand for the proposition that courts should not rigorously scrutinize statutes singling out individuals for burdensome treatment.

In *Dukes*, the Court applied the rational basis test to a New Orleans ordinance exempting from a prohibition on push-cart food sales in the French Quarter those vendors who had operated there for at least eight years, of whom there were two. However, the *Dukes* holding that the rational basis test should apply to legislation singling out particular individuals for *beneficial* treatment is far different from a holding that the rational basis test should apply to legislation singling out a particular person for *burdensome* treatment. For example, in *Morey v. Doud*, 354 U.S. 457 (1957), which held unconstitutional a general statute *exempting* a named company, and which *Dukes* overruled, the Court noted that an exemption of a single company presents the "converse" of imposing a burden on one company. *Id.* at 467; *see INS v. Chadha*, 462 U.S. 919, 935 n.8 (1983); *id.* at 966 n.9 (Powell, J., concurring); *Attorney General of New York v. Soto-Lopez*, 106 S. Ct. 2317, 2328 (1986) (Stevens, J., dissenting) ("A governmental decision to grant a special privilege to a minority group is less objectionable than a decision to impose a special burden on a minority.").

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[6] This Court's cases provide judicial protection against naked political preferences by creating a series of presumptions about what kind of legislative classifications are *most likely* to reflect naked political preferences. For example statutory classifications based on race, sex, or illegitimacy are subject to higher levels of scrutiny than are other kinds of classifications, because the Court has found that these "suspect" or "semi-suspect" classifications are more likely to reflect naked preferences than are other types of classifications. *See* Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 140.

Fort Smith Light & Traction Co. v. Board of Improvement, 274 U.S. 387 (1927), did not involve the issue of the level of scrutiny to apply to a statute intentionally singling out a person by name for burdensome treatment. The state statute approved in that case was general on its face; it required all street railroads to pave portions of their tracks, and only happened to affect one company. To the same effect is *Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220 (1949), where the Court upheld a South Carolina law that prohibited life insurance companies and their employees from operating an undertaking business. At the time, the plaintiff was the only company that fell within the statute's coverage. The Court held that this presented no equal protection violation:

> That respondent company is the only concern now affected by the statute does not, of course, mean a denial of equal protection. The statute is drawn in general terms; the company's success might induce others to enter the business.

Id. at 225 n.5. The *Daniel* and *Fort Smith* cases show that the fact that only one company engages in a particular business in a particular area does not prevent the legislature from regulating that business. This does not dictate the level of scrutiny that should apply when Congress singles out one small railroad in Maine from all of its competitors and imposes burdens upon it that it does not impose upon any other business in the country.

Nixon v. Administrator of General Services, 433 U.S. 425 (1977), also does not dictate that the rational basis test should apply to special legislation singling out a particular person for burdensome treatment. In *Nixon*, the Court rejected the former President's challenge to a statute that required him to surrender his presidential papers. The Court rejected the challenges based upon the separation of powers, presidential privilege, privacy, First Amendment, and the bill of attainder clause. In dicta, the Court implied that the statute also did not violate the equal protection clause. *See id.* at 471 n.33.

The *Nixon* opinion implies that had Mr. Nixon pressed his equal protection challenge, that challenge would have failed for the same reason that the statute did not violate the specificity element of the bill of attainder clause. In addressing President Nixon's bill of attainder argument, the Court held that it was proper for the Congress to focus upon Mr. Nixon's papers because he had entered into an

agreement that created a danger of various documents being destroyed if Mr. Nixon, who was seriously ill at the time, were to die. *See id.* at 472. The Court went on to note that Congress did not deal with Mr. Nixon's papers alone, but also established a commission to study and recommend legislation regarding the preservation of the papers of future presidents.

This Court has not had the opportunity to construe its holding on the specificity issue in *Nixon*. The Railroad submits that this holding, at least as it applies to equal protection analysis, is strictly limited to its facts and to cases equally as extraordinary as *Nixon*. As Justice Stevens noted in his opinion concurring in the bill of attainder holding, "there is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by deciding individual cases," *id.* at 486 (Stevens, J., concurring), and that "even when it deals with presidents or former presidents, the legislative focus should be upon 'the calling' rather than 'a person.' " *Id.* (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867)). Justice Stevens concluded that "this case will not be a precedent for future legislation which relates, not to the office of president, but just to one of its occupants." *Id.*

Because of the dangers inherent in such legislation, the *Nixon* opinion should not be read as sanctioning the use of the rational basis test for legislation singling out a person for burdensome treatment, and this Court should grant certiorari to make clear that heightened scrutiny must apply to such special legislation.

B. *Due Process*

Even if the court of appeals was correct in its conclusion that the rational basis level of review was applicable to the Act, the court totally abdicated its responsibility to apply this test to the retroactive aspects of the legislation. The Act, as "implemented," requires the Railroad to pay $26,000 to any employee represented by the Organization whose job the Railroad abolishes. However, not only does the Act require payments to workers whose job the Railroad abolishes in the future, the Act also applies retroactively, requiring the Railroad to make the same payment to the Organization's members whose jobs the Railroad abolished — in accordance with its contract with

the Organization — because of the Railroad's loss of business due to those workers' strike. This aspect of the bill cannot survive scrutiny.

Congress had no justification for requiring the Railroad to make payments to those workers whose jobs the Railroad justifiably abolished because of reductions in business caused by these workers' own job action. Neither the government nor the court below have proffered any rationale for requiring these retroactive protection payments. In fact, in other cases the ICC has refused to impose retroactive protection payments on the ground that such a requirement would be unfair to the carrier who participated in a transaction under the assumption that such payments would not be required. *See Knox & Kane Railroad Co.*, 366 I.C.C. 439, 444 (1982). The court of appeals also failed to articulate why it was rational to require the Railroad to make these retroactive protection payments. The court simply held that it was reasonable for Congress to "address all the issues in dispute and resolve them." 835 F.2d at 371. Under the court's reasoning, if was rational for Congress to resolve the dispute, any terms that Congress might dictate — no matter how arbitrary or unfair — would satisfy due process.

The Constitution requires more than this. This Court has held that a court reviewing retroactive legislation must satisfy itself that "the retroactive aspects of legislation, as well as the prospective aspects, . . . meet the test of due process . . . ." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). In addition, the justifications for the prospective aspects of legislation "may not suffice" to justify the retroactive aspects. *Id.*

None of the justifications that this Court has proffered for retroactive legislation are applicable here. In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the court held that it was reasonable for Congress to apply retroactively legislation relating to an employer's liability for withdrawing from a multi-employer pension plan, lest employers attempt to avoid liability by withdrawing during the consideration of the bill. *See id.* at 731 (finding retroactive provision of statute justified "to prevent employers from taking advantage of a lengthy legislative process"). However, it is undisputed that this rationale has no applicability here, since the Railroad abolished the jobs at issue prior to the convening of the Board.

Turner Elkhorn involved the constitutionality of a federal statute requiring employers to pay benefits to employees affected by black lung disease, including those employees who left employment prior to the effective date of the act. The court rejected a constitutional challenge to the retroactive aspects of the legislation, finding that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the cost of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers." 428 U.S at 18.

The legislation at issue in *Turner Elkhorn* required the employer to compensate the employee for an employment-related disability. No such connection exists here. The workers entitled to these retroactive protection payments were terminated because of a reduction in traffic caused by their own strike. It is arbitrary in the extreme to allow a union to strike, cause damage to the struck carrier, and then, after the fact, require the carrier to reimburse those employees whose jobs were necessarily abolished because of the reduction in business that the employees' strike caused. Unlike the workers afflicted with black lung disease, the employees represented by the Organization are victims of their own voluntary conduct and are not thereby disabled from any other employment. Requiring payments to these workers gains nothing for the Railroad or for the public in terms of labor stability, efficiency, or safety. These payments are simply a windfall — a naked transfer of wealth from the Railroad to these individuals, and the court of appeals' failure to address these issues conflicts with this Court's decisions concerning review of retroactive legislation. *See Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1028 (1986) (O'Connor, J., concurring) ("Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee.").

C. *Separation of Powers*

This Court's cases establish that when Congress intervenes in a dispute between two particular private parties and purports to "settle" the dispute between them by imposing burdens on one party,

such action violates the separation of powers and is therefore void. The Court recently held that violations of Article III

> must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the principle that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."

Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245, 3256 (1986) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985)).

One of the most important purposes of Article III is to prevent the legislature from adjudicating the rights of particular persons. *See INS v. Chadha*, 462 U.S. 919, 960-63 (1983) (Powell, J., concurring); *United States v. Brown*, 381 U.S. 437, 442-46 (1965). The Act violates this principle because it adjudicates the rights and liabilities of the parties to an ongoing, active dispute.

Although the court of appeals had recognized in *Maine Central I* that "a statute aimed at specific individuals runs the risk of becoming an instrument that realigns particular parties' rights," 813 F.2d at 492, the court in *Maine Central II* held that the Act did not violate the separation of powers, because " 'a law that is an otherwise valid exercise of legislative authority does not go beyond that authority solely because it affects a named few.' " 835 F.2d at 372 (quoting *Maine Central I*, 813 F.2d at 493).

The court of appeals below relied upon *INS v. Chadha*, 462 U.S. 919 (1983), for the proposition that the Act was not addressed to a justiciable case or controversy. 835 F.2d at 472; *see also Maine Central I*, 813 F.2d at 493. The court's reliance upon *Chadha* was misplaced. In *Chadha*, the Court disagreed with Justice Powell's position that the one-house veto of a suspension of deportation constituted a judicial act: "Federal courts do not enjoy a roving mandate to correct alleged excesses of administrative agencies; we are limited by Art. III to hearing cases and controversies and no justiciable case or controversy was presented by the Attorney General's decision to allow Chadha to remain in this country." *Id.* at 957 n.22. The Court implied that federal courts could never have jurisdiction to review a decision of the Attorney General to suspend deportation of an alien, since no case or controversy would be

presented between the alien, who wished to remain in this country, and the Attorney General, who was willing to accede to the alien's wishes. *Id.*

In this case, by contrast, there are two active disputants, and several aspects of this dispute have been the subject of judicial proceedings. Had Congress passed a law that stated "the Railroad is adjudged liable to the Organization in the amount of $3,500,000," there is no question that such a statute would violate the separation of powers. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 391-92 (1980); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410-14 (1792). The fact that the Act is legislative in form should not change this result, *see Hurtado v. California*, 110 U.S. 516, 535 (1884), and to allow it to do so would elevate form over substance, something this Court has consistently refused to do in its separation of powers cases. *See Thomas*, 473 U.S. at 568; *Chadha*, 462 U.S. at 952.

CONCLUSION

This petition for a writ of certiorari should be granted and, upon review, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 87-1309

THE MAINE CENTRAL RAILROAD COMPANY, ET AL.,

Plaintiffs, Appellants,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. Gene Carter, *U.S. District Judge*]

Before
Coffin, Aldrich and Torruella,
Circuit Judges.

John Spelman with whom *Andrew O. Schiff* and *Klehr, Harrison, Harvey, Branzburg, Ellers & Weir* were on brief for appellants.

Jeffrey Clair, Appellate Staff, Civil Division, Department of Justice, with whom *William Kanter*, Appellate Staff, Civil Division, Department of Justice, *Richard K. Willard*, Assistant Attorney General, and *Richard S. Cohen*, United States Attorney, were on brief for appellee National Mediation Board.

Richard S. Edelman with whom *John O'B. Clarke, Jr.*, and *Highsaw & Mahoney, P.C.* were on brief for appellee Brotherhood of Maintenance of Way Employees.

December 11, 1987

TORRUELLA, *Circuit Judge*. This case comes to us on Maine Central Railroad Company's appeal from summary judgment in its action seeking to enjoin operation of Pub. L. No. 99-431, 100 Stat. 987 (Sept. 30, 1986) (the "Second Act"). We consider, on appeal, whether Congress properly imposed certain financial burdens on Maine Central and its wholly-owned subsidiary, the Portland Terminal Co. (hereinafter, collectively, the "Railroad" or "Maine Central"), in order to resolve a labor dispute between the Railroad and certain of its employees. Appellant urges us to hold that such individualized attention, in this case and in view of the specific burdens imposed, violates the Equal Protection and Due Process components of the fifth amendment to the Constitution; or that Congress' chosen method of resolving the dispute violates the doctrine of separation of powers.

The labor dispute may at one time have been an "isolated collective bargaining dispute between a small Maine railroad and a national labor organization." Appellant's Brief at 3. As a result of nationwide secondary striking, however, it snowballed to affect railroads across the nation, and to involve the state courts of Maine, several federal district courts, the First, Second and Seventh Circuits, and even the Supreme Court of the United States. *See Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987). Indeed, even the intervention of the President of the United States himself has become necessary in this "isolated collective bargaining dispute," through the appointment of Emergency Board 209 on May 16, 1986, *see* 45 U.S.C. § 160.

Nor is Congress a stranger to the dispute. The creation of an Emergency Board, under 45 U.S.C. § 160, automatically entails a "cooling off" or moratorium period. While this moratorium temporarily stopped the strike, it expired without bringing about an end to the dispute. As a result, Congress statutorily extended the moratorium in the "First Act." Pub. L. No. 99-385, 100 Stat. 819 (Aug. 21 1986). We upheld that law in an earlier suit and appeal concerning many of the same issues raised today. *See Maine Central Railroad Co.* v. *Brotherhood of Maintenance of Way Employees*, 813 F.2d 484 (1st Cir. 1987) (*Maine Central I*). Despite this additional hiatus the parties again failed to settle their differences during the enforced cease-fire, as a result of which Congress passed the Second Act, ending the war by legislating substantive resolution of all the underlying

differences, and mandating binding arbitration for any "unresolved implementing issues." The Second Act, in its entirety, is reproduced in the Appendix.

The specific terms of the Second Act also have a long history. Emergency Board 209, mentioned above, held hearings at which both parties were represented and were given every opportunity to present their positions. The Board then issued a report which essentially adopted a proposal made by the Railroad to the Union during earlier negotiations (with the sole exception that the Board granted protection payments of $26,000 per employee, rather than $20,000). The Union, but not the Railroad, accepted this proposal during the ensuing 30-day moratorium.

When the First Act extended the moratorium an additional 60 days, it also created a Congressional Advisory Board which was to report to Congress on the progress of negotiations, relevant financial and other circumstances, and any developments since the beginning of the strike against Maine Central. It is evident from the report of the Advisory Board, reproduced in the parties' Joint Appendix at p. 380a, that Maine Central was able to submit exhibits and briefs, with information updating that presented to the Emergency Board.

After painstaking examination of the parties' contentions, and the financial condition of Guilford (Maine Central's parent corporation), the Advisory Board rejected the argument that the strike had so changed the condition of the Railroad as to render Maine Central's earlier proposal no longer feasible. Joint Appendix at 405a. The Advisory Board recommended that:

> In the absence of agreement between the parties disposing of this dispute no later than September 13, 1986, the Congress should enact legislation directing the parties to accept and apply the recommendations of [Emergency Board] 209. Should the parties be unable to agree as to all necessary details in applying the recommendations by October 1, 1986 any unsettled issues should be submitted to final and binding arbitration before an arbitrator designated by the [National Mediation Board].

Joint Appendix at 413a.

With very little debate, the Congress adopted the recommendations of the two Boards, and passed Senate Joint Resolution 415, which became law (the Second Act) when the President signed it on September 30, 1986.

It is this law that is said to contravene the Equal Protection component of the fifth amendment to the United States Constitution. At the outset, Maine Central concedes that, under our holding in *Maine Central I*, the legislation at issue need only survive the so-called minimum rationality test: "Economic legislation, . . . 'that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose.' " *Maine Central I*, 813 F.2d at 488 (quoting *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981)).

Maine Central also grants that the act's stated purpose — "that essential transportation services be maintained" — is legitimate. It claims, however, that the classification chosen by Congress to achieve this purpose is completely arbitrary or irrational. Appellant argues that "nothing unique to the Railroad's past labor dispute justifies [the Act's] specific and severe burdens." Appellant's Brief at 21. The Railroad's singularity, however, has been addressed already in *Maine Central I*. There we concluded:

> There may be hundreds of active railroad labor disputes, and, as Maine Central points out, others may turn out to have national impact, but it was the Maine Central-BMWE dispute that in Congress' judgment was threatening to disrupt interstate commerce. This was not arbitrary or irrational; the Act, therefore, did not violate the equal protection component of the fifth amendment.

Id. at 492. It was the same threat, caused by the same dispute, that Congress was dealing with in the Second Act. Nothing occurred, between the two Acts, to rid Maine Central of its uniqueness.

Justice Brennan, in a different context, remarked on the rarity of a railway labor dispute causing such widespread disruption of transportation services as in this case:

> "In the history of the Railway Labor Act there have been only three widely-known labor disputes in which rail unions

> have undertaken any secondary economic activity." Brief for National Railway Labor Conference as *Amicus Curiae* 27. In making this statement, *amicus* refers to the Florida East Coast Railway dispute of the early 1960's, see *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L.Ed.2d 344 (1969); the 1978 dispute between the Norfolk and Western Railway and the Brotherhood of Railway and Airline Clerks, see *Consolidated Rail Corp.* v. *Railway Clerks*, 99 BNA LRRM 2607 (WDNY 1978), appeal dismissed as moot, 595 F.2d 1208 (CA2 1979); and the dispute at issue here involving Guilford and BMWE. Brief of *Amicus Curiae*, *supra*, at 27.

Burlington Northern Railroad Co. v. *Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841, 1855 n.16 (1987).

It is evident, therefore, that targetting the Maine Central-BMWE dispute is not "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985). Faced with a dispute which threatened rail transportation across the country, Congress moved to resolve that dispute alone.

Maine Central may still argue that the means chosen are not rationally related to the purpose Congress sought to achieve. We note that the test does not require us to find that Congress used the best, or even the fairest method to solve the perceived national problem: "[i]t is enough that [the Court is] able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966).

Maine Central's principal contention appears to be that secondary activity, picketing for example, is in general the evil Congress sought to address. The Railroad then depicts potentially crippling secondary activity as looming over the entire railroad industry, as a result of any one of several hundred ongoing labor disputes. Finally, it points to the provisions of the Second Act, which admittedly do not even proscribe secondary picketing in future disputes between Maine Central and the BMWE. Maine Central concludes that the provisions lack minimum rationality because they do nothing to address the larger problem, which is ensuring the continued operation of the country's railways in the face of the overarching threat of secondary

activity. Congress, in effect, should have limited itself to forbidding secondary picketing.

It is entirely possible, indeed likely since they are obviously aware of the problem, that Congress does not, as a general principle, share Maine Central's views as to secondary action in the railroad industry. In fact, the Supreme Court in 1968 said that "[n]o cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386 (1969). More recently, the Court announced that "[i]n the Norris-La Guardia Act, Congress divested federal courts of the power to enjoin secondary picketing in railway labor disputes. Congress has not seen fit to restore that power." *Burlington Northern*, 107 S. Ct. at 1855. It is less than wild supposition, therefore, to hypothesize that Congress does not wish to completely eliminate the weapon of secondary action from the railway workers' self-help arsenal. The legislature may rationally decide to allow the unions the use of this powerful economic tool, and yet curb its effects when they reach crisis proportions. As already remarked, it does not appear, from the history of the Railway Labor Act, that secondary activity is so endemic as to require that in order to act rationally, Congress must act to prohibit it in all instances, rather than resolving a particular crisis as it arises.

The Supreme Court strongly suggests that this carefully balanced interplay between unbridled self-help and potential direct congressional intervention is relevant to whatever success the Railway Labor Act may have had in promoting stability in that industry:

> Furthermore, as this case illustrates, § 10 of the RLA provides a ready mechanism for the Executive Branch to intervene and interrupt any self-help measures by invoking an Emergency Board and thereby imposing at a minimum a 60-day cooling-off period. If the Board's recommendations are not initially accepted by the parties, Congress has the power to enforce the Board's recommendation by statute, as it has done here. Allowing secondary picketing in the self-help period is thus not inconsistent with the structure or purpose of

> the Act, and may in fact increase the likelihood of settlement prior to self-help.

Burlington Northern, 107 S. Ct. at 1854-55.[1]

Congress' power to intervene in a railway labor dispute was recognized in clear terms in *Wilson* v. *New*, 243 U.S. 332 (1916), where the Court upheld an act of Congress imposing specific terms on the parties to such a dispute:

> [T]here would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages caused by the failure to exercise the private right as a result of the dispute between the parties, *that is, to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance* to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed.

Id. at 350 (emphasis supplied).

We note further that Congress is clearly entitled to deal with a problem in "piecemeal" fashion rather than attempting to deal with every conceivable situation at once. *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955). It has the power, therefore, to deal with each crisis as it arises, rather than trying to forestall any and all threats to railway transportation with one statute.

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[1] Nor is this a completely isolated case of congressional resolution, in substantive terms, of a railway labor dispute. *See* Pub. L. No. 88-108, 77 Stat. 132 (Aug. 28, 1963) (constitutionality upheld in *Brotherhood of Firemen & Engineers* v. *Chicago, B. & Q. R.R. Co.*, 225 F. Supp. 11 (D.D.C.), *aff'd per curiam*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964)); Pub. L. No. 90-10, 81 Stat. 12 (April 12, 1967); Pub. L. No. 90-13, 81 Stat. 18 (May 2, 1967); Pub. L. No. 90-54, 81 Stat. 122 (July 17, 1967); Pub. L. No. 91-203, 84 Stat. 22 (March 4, 1970); Pub. L. No. 91-541, 84 Stat. 1407 (Dec. 10, 1970) (constitutionality upheld in *Louisville & N.R.R. Co.* v. *Bass*, 328 F. Supp. 732 (W.D. Ky. 1971)); Pub. L. No. 92.17, 85 Stat 39 (May 18, 1971); Pub. L. No. 93-5, 87 Stat. 5 (Feb. 9, 1973); Pub. L. No. 97-262, 96 Stat. 1130 (Sept. 22, 1982). All of these acts, however, unlike the Second Act, resolved more or less nationwide disputes, although by their terms they targeted only the parties to each dispute.

The final contention to deal with is that it is irrational to grant protection payments and back pay to workers who are no longer in the industry, in the expectation of future gains. This the Railroad labels retroactive legislation, and attacks, likening it to the legislation struck down in *Zobel* v. *Williams*, 457 U.S. 55 (1982) (Alaska statute distributing mineral dividends on basis of length of in-state residency). In this case, however, the dispute was ongoing, and it concerned precisely the issues addressed by the so-called retroactive legislation — protection payments and workforce reduction. Congress may well have decided that in order to avoid festering sores later, it should address all the issues in dispute and resolve them.

While Maine Central sees this Act as imposing burdens on only one entity, it should be noted that the Act demands concessions from both parties, thus affecting all of the Maine Central workers represented by the BMWE. The Railroad, in exchange for terms it had been willing to grant earlier, was given the right to a certain maintenance schedule and workforce reduction. It is not for us to decide if $26,000 in protection payments is too much or too little, as long as these payments rationally relate to settlement of the dispute that continued to threaten to paralyze rail traffic in various parts of the country.

The Railroad says "[t]here is no doubt that the Second Act resolves (for the time being) this dispute. However, the constitutional issue presented is whether the means Congress chose to resolve the dispute relate to any legitimate state purpose." Reply Brief of Appellant, at p. 3, n.1. Congress chose not to strip the Union of its self-help remedies, thereby allowing the Railroad a free hand in changing working conditions. Instead, it imposed a solution it found equitable, one recommended by two impartial Boards, after hearings, and one that definitively laid to rest the concerns that had given rise to the labor unrest. Had it not done this, it is entirely possible that a new, disruptive labor dispute would again arise. We find therefore, that the classification, scope, and terms of the Second Act are all rationally related to the end of ensuring continued railroad service.

The test for legislation under the Due Process component of the Fifth amendment is no less deferential than the Equal Protection test, nor does it differ for retroactive legislation. "[A]lthough we have noted that retrospective civil legislation may offend due process if it is "particularly 'harsh and oppressive,' " . . . that standard does

not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in [*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)]." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (citations omitted, quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977)).

The Second Act, therefore, would offend due process only if the terms of the forced settlement are arbitrary or irrational or if applying those terms to ex-employees as well as present employees is arbitrary or irrational. *Pension Benefit Guaranty Corp.*, at 730. As we explained above, neither of these propositions is true. The Second Act does not, therefore, violate the guarantees of due process embodied in the Fifth amendment.[2]

Next we address Maine Central's argument that the Second Act is an adjudication, in violation of the doctrine of separation of powers. We need not reestablish the proposition that "a law that is an otherwise valid exercise of legislative authority does not go beyond that authority solely because it affects a named few." *Maine Central I*, 813 F.2d 484, 493 (1st Cir. 1987). Appellant recognizes that, but goes on to say that the Second Act's failing consists of realigning particular parties' rights, explaining that "the Second Act focuses on two active disputants and purports to decide the merits of the controversy between them." Appellants' Brief, at 30.

Turning first to the character of the dispute, we note that Congress did not in this case intervene in the midst of a justiciable controversy. *Cf. Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52 (1st Cir. 1987). Rather, the parties were in the self-help stage of Railway Labor Act procedures, and no judicial action could have been brought by either party to bring about resolution of the dispute. We cannot find a legislative encroachment on judicial powers, where the judiciary was powerless to act in the controversy.

Furthermore, Congress did not decide the dispute on the basis of pre-existing rules, interpreting and applying the law. As the district

[2] Procedural due process is not directly raised in the briefs. In any event it is hard to imagine what more Congress could have done in that respect. The Railroad actively participated in two separate hearings before impartial boards, with full opportunity to present its arguments and evidence. See the discussion of the district court in this regard. *Maine Central Railroad Co.* v. *Brotherhood of Maintenance of Way Employees*, 657 F. Supp. 971 (D. Me. 1987).

court found, "the Second Act has 'the purpose and effect of altering legal rights, duties, and relations of persons, . . . all outside the Legislative Branch.' [*INS* v. *Chadha*, 462 U.S. 919, 952] This purpose and effect is legislative." *Maine Central*, 657 F. Supp. 971, 981. Congress weighed broad issues of policy affecting the national economy, and imposed certain rules on Maine Central and the BMWE. Prior to the Second Act, there were no relevant rules applicable to the situation, and then Congress enacted certain rules to affect it.

In *Maine Central I*, we noted Justice Holmes' statement that "[t]o make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate . . ." *Springer* v. *Philippine Islands*, 277 U.S. 189, 210 (Holmes, J., dissenting); *see also Airlines Pilots Ass'n International* v. *Quesada*, 276 F.2d 892, 896 (2d Cir. 1960) ("Adjudication . . . is the application of a . . . legal standard to a given situation . . ."). Difficult as it is at times to distinguish the different governmental functions, there is no doubt that here Congress was creating rules, not merely applying them to a given situation.

The last infirmity attributed by Maine Central to this Act is that it effects an unconstitutionally standardless delegation of legislative authority, in that it imposes mandatory arbitration of unresolved implementing issues without giving the arbitrator any guiding decisional principles. The Supreme Court has stated that we need not find these guidelines explicit in the Act. "A term that appears vague on its face 'may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context.' *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946). Although FIFRA's language does not impose an explicit standard, the legislative history of [the amendments at issue] is far from silent." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593 (1985) (remanding for consideration of standardless delegation issue).

Traditionally, the Supreme Court has not required a great deal of precision in the standards imposed on Congressional delegates:

> "Just and reasonable" rates for sales of natural gas; "public interest, convenience, or necessity" in establishing rules and regulations under the Federal Communications Act; prices yielding a "fair return" or the "fair value" of

> property; "unfair methods of competition" distinct from offenses defined under the common law; "just and reasonable" rates for the services of commission men; and "fair and reasonable" rent for premises, with final determination in the courts.

Lichter v. *United States*, 334 U.S. 742, 786 (1948) (citations omitted) (upholding "excess profits" as standard for taxation purposes). The district court properly recognized that this arbitration was far from being devoid of Congressional guidance.[3] If the guidelines quoted above, in *Lichter*, are sufficient, then surely it is sufficient to tell an arbitral body that it must "implement" an Act, with precise recommendations, the purpose of which is to ensure uninterrupted railroad transportation through the resolution of this labor dispute; and, furthermore, that the arbitration must be conducted in accordance with the Railway Labor Act.

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[3] The district court found the following standards in the Second Act:

> "[T]he Second Act specifically refers to the report and recommendations of Emergency Board No. 209 as defining the basis for the unresolved implementing issues that were to be arbitrated in the present dispute. This reference sufficiently defines the scope of the arbitration. In addition, the recommendations themselves provide the following standards: one, job protection payments should be provided for employees who were "currently active" as of March 3, 1986; two, the parties should agree to system seniority for production work "similar to those agreements negotiated on the Boston & Maine and the Delaware & Hudson rail lines of the Guilford System" with a per diem allowance "not less than that which is currently paid to maintenance of way employees" in the Guilford system; three, changes in rates of pay and health and welfare programs should be governed by the results of national negotiations; four, changes in local rules and working conditions should be addressed under the Railway Labor Act "up to but not including mandatory arbitration or resort to self-help." Moreover, the Second Act provides that section 7 of the Railway Labor Act should control the actual arbitration. By bringing the arbitration within the Railway Labor Act, Congress clearly provided adequate standards for the conduct of the arbitration. Finally, because binding arbitration is an explicit, albeit usually voluntary, provision of the Railway Labor Act, 45 U.S.C. § 157, the standards for the present mandatory arbitration may be derived from the Railway Labor Act itself. When these standards are combined with the factual background of the current dispute and the recommendations of Emergency Board No. 209, both of which arose from the Railway Labor Act, the Court finds that Congress has provided sufficient standards for this arbitration."

Maine Central, 657 F. Supp. 971, 987.

For the above-stated reason, the judgment of the district court is *affirmed.*

APPENDIX

Whereas the labor dispute between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company, and certain of the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees threatens essential transportation services of the Nation;

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained;

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers;

Whereas the President by Executive Order Numbered 12557 of May 16, 1986, pursuant to the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160), created a Presidential Emergency Board to investigate the dispute and report findings.

Whereas the recommendations of President Emergency Board Numbered 209 for settlement of such dispute have not yet resulted in a settlement;

Whereas the extension of the provisions of section 10 of the Railway Labor Act (45 U.S.C. 160) for an additional 60-day period to such dispute provided by the joint resolution entitled: "Joint resolution to provide for a temporary prohibition of strikes or lockouts with respect to the Maine Central Railroad Company and the Portland Terminal Company labor-management dispute", approved August 21, 1986 (Public Law 99-385), has not yet resulted in a settlement of such dispute;

Whereas the advisory board established pursuant to section 2 of such joint resolution recommended that in the event that the parties to the dispute were unable to reach agreement on the dispute before September 13, 1986, the Congress should enact legislation directing the parties to accept and apply the recommendations of Emergency Board Numbered 209, and if such parties are unable to agree as to

all necessary details in applying the recommendations of such Emergency Board, all such unsettled issues should be submitted to final and binding arbitration;

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not yet resulted in settlement of the dispute;

Whereas the Congress, under the Commerce Clause of the Constitution, has the authority and responsibility to ensure the uninterrupted operation of essential transportation services; and

Whereas the Congress in the past has enacted legislation for such purposes: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following conditions shall apply to the dispute referred to in Executive Order Numbered 12557 of May 16, 1986, between the common rail carriers, Maine Central Railroad Company and Portland Terminal Company (hereinafter in this resolution referred to as the "carriers") and the employees of such carriers represented by the Brotherhood of Maintenance of Way Employees.

(1) The parties to such dispute shall take all necessary steps to restore or preserve the conditions out of which such dispute arose as such conditions existed before 12:01 ante meridiem [sic] of March 3, 1986, except as provided in paragraphs (2) through (4).

(2) The report and recommendations of Presidential Emergency Board Numbered 209 shall be binding on the parties and shall have the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.), except that nothing in this joint resolution shall prevent a mutual written agreement by the parties to any terms and conditions different from those established by this joint resolution.

(3) (A) If there are unresolved implementing issues remaining with respect to the report and recommendations or agreement under paragraph (2) after ten days after the date of the enactment of this joint resolution, the parties to the dispute shall enter into binding arbitration to provide for a resolution of such issues.

(B) The National Mediation Board established by section 4 of the Railway Labor Act (45 U.S.C. 154) shall appoint an arbitrator to resolve the issues described in subparagraph (A). Except as provided in this joint resolution, such arbitration shall be conducted as if it were under section 7 of such Act, and any award of such arbitration shall be enforceable as if under section 9 of such Act.

(4) Within thirty days after the date of the enactment of this joint resolution, the binding arbitration entered into pursuant to paragraph (3) shall be completed.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 87-1309

THE MAINE CENTRAL RAILROAD COMPANY, ET AL.,

Plaintiffs, Appellants,

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v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: December 11, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Messrs. Spelman, Branzburg and Edelman]

APPENDIX B

United States District Court
District of Maine

THE MAINE CENTRAL RAILROAD COMPANY,
and THE PORTLAND TERMINAL COMPANY,

Plaintiffs

v. Civil No. 86-0311-P

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES, and NATIONAL MEDIATION BOARD,

Defendants

CARTER, District Judge

OPINION AND ORDER

This case is before the Court for a decision on the merits regarding the constitutionality of a special act of Congress, Pub. L. 99-431, 100 Stat. 987 (Sept. 30, 1986), which effectively ended the long labor dispute between Plaintiffs, Maine Central Railroad Company and Portland Terminal Company (the Railroad), and Defendant Brotherhood of Maintenance of Way Employes[1] (BMWE). The Railroad and BMWE have brought the case forward for decision on cross motions for Summary Judgment; in addition, Defendant National Mediation Board (the Board) has filed a Motion to Dismiss, alleging that no justiciable controversy exists as to the Board. Fed. R. Civ. P. 12(b)(6). The Court finds that there is no genuine issue of material fact regarding the constitutionality of Public Law 99-431 and that summary judgment is therefore appropriate at this time. For the reasons developed more fully below, the Court holds that the above-cited special act of Congress is constitutional and therefore grants Defendant BMWE's Motion for Summary Judgment. In addition,

[1] The Court has noted that BMWE uses the alternative spelling of "employees" that appears above. The Court, therefore, purposefully adopts this spelling in this opinion even though both this and other courts have not uniformly done so in prior opinions.

the Court finds no justiciable controversy as to the Board and therefore grants Defendant Board's Motion to Dismiss.

I. FACTUAL BACKGROUND

The present case is but one in a series of cases that have arisen from BMWE's attempts to obtain an employee protective agreement with the Railroad in response to the Railroad's massive furloughs of maintenance of way employees. The actual underlying dispute arose on April 2, 1984 when BMWE, in compliance with Section 6 of the Railway Labor Act (45 U.S.C. § 156), served notice on the Railroad of BMWE's desire to change the existing collective bargaining agreements between the parties. The factual background of the dispute has been detailed at length in several related cases, *see Railway Labor Executives' Ass'n v. Boston & Maine Corp.*, 808 F.2d 150, 152-56 (1st Cir.), *aff'g in part, rev'g in part* 639 F. Supp. 1092 (D. Me. 1986); *Brotherhood of Maintenance of Way Employees v. Guilford Transp. Indus.*, 803 F.2d 1228, 1229-30 (1st Cir. 1986), and need not be detailed at length again here except for the following portion relevant to the issue currently before the Court.

After exhausting the major dispute procedures available under the Railway Labor Act, and in response to the abolishment of additional maintenance of way positions, BMWE exercised self-help and initiated a strike against the Railroad in March, 1986. BMWE extended its self-help action, in the form of secondary picketing, first to additional carriers owned by the Railroad's parent corporation, Guilford Transportation Industries, Inc., and later to selected carriers outside the Guilford system. On May 16, 1986, President Reagan halted the strike and created Emergency Board No. 209 under Section 10 of the Railway Labor Act, 45 U.S.C. § 160. Executive Order No. 12557, 51 Fed. Reg. 18429 (May 20, 1986). The President's Order also required the parties to maintain the pre-March 3, 1986 status quo until 12:01 a.m. on July 21, 1986.

While the prestrike status quo was being maintained, Emergency Board No. 209 undertook to fulfill the Presidential mandate. Formal hearings began on May 28 and concluded on June 10. The Board submitted its Report and Recommendations to the President

on June 20, 1986. In that Report, the Board noted that "[t]he parties were given full opportunity to present oral testimony, documentary evidence and argument in support of their respective positions, including rebuttal . . . and post-hearing statements . . . . Both parties were represented by Counsel." Report to the President by Emergency Board No. 209, June 20, 1986, at 3. The Emergency Board concluded that the Railroad "had substantial need to embark upon a major change in the manner in which it would maintain its right-of-way . . . [and] that the magnitude of such change adversely affected an inordinate number of maintenance of way employees." *Id.* at 15. The Emergency Board concluded that the Railroad's circumstances were quite unique. The sale of the Railroad to Guilford Transportation Industries in 1981 had resulted in rapid technological and organizational changes. Although the Railroad had extended job protections to other classes of workers, BMWE members were not included. In addition, the vast majority of BMWE workers lacked protected status under other industry-wide agreements which already bound other carriers who had not taken until the 1980's to mechanize their work forces. *Id.* at 15-17. Based on these unique circumstances, the Emergency Board recommended that the dispute be resolved as follows:

1. The Carrier's proposal dated March 2, 1986 for job protection for then currently active employees, as subsequently modified and presented to the Organization on March 3, 1986, should be adopted; the protective allowance to be $26,000.

2. The parties should negotiate a comprehensive agreement for System Production Maintenance Crews to be used throughout the entire geographical confines of the Maine Central Railroad and the Portland Terminal Company similar to those agreements negotiated on the Boston & Maine and the Delaware & Hudson rail lines of the Guilford System.

3. Consistent with the parties' proposals of March 2 and 3, 1986, and in view of their past practice, the parties should agree to be bound by the results of the national negotiations involving rates of pay and health and welfare programs.

1 The parties should agree to handle changes in work rules and practices contained in notices which had been served prior to Executive Order 12333 under the orderly and peaceful procedures of the Railway Labor Act as amended, up to and including mediation, and without resort to self help.

Id. at 22-23.

The hiatus from self help imposed by the executive order and the acceptance by the Emergency Board of the Railroad's March 2 1986 proposal failed, however, to bring about a resolution of the dispute. Congress then enacted Public Law 99-385, 100 Stat. 819 (1986), (the First Act), to extend the status quo period for an additional sixty days.[1] This enactment also created a Congressional Advisory Board, appointed by the National Mediation Board. The Advisory Board was specifically charged to investigate and report to Congress both the progress of any ongoing negotiations and the financial and other circumstances of the dispute including developments since March 3, 1986. The Advisory Board was also to recommend a proposed solution and was not limited to the issues addressed by Presidential Emergency Board No. 209. The precise manner in which the Advisory Board undertook to perform its duties is not known to the Court. The Advisory Board completed its task and issued its report to Congress on September 8, 1986. H.R. Rep. 99-868, 99th Cong., 2d Sess., at 2 (1986). The Advisory Board recommended that, unless the parties ended the dispute by agreement before September 15, Congress enact legislation directing the parties to accept the recommendations of Presidential Emergency Board No. 209 and requiring the parties to submit any unsettled issues to binding arbitration.

Congress took precisely this action when it enacted Public Law 99-431, 100 Stat. 987 (September 30, 1986) (the Second Act). Congress expressly stated the purpose of the legislation: to preserve transportation services essential to the national interest but threatened by the current labor dispute. It noted that emergency measures were essential to this purpose. As authority for its action, Congress specifically relied on its powers and responsibilities under the Commerce Clause of the Constitution. Based on the classic principles governing the exercise of equitable powers, this Court refused to enjoin the enforcement of the Second Act in *Maine Central R.R. v. Brotherhood of Maintenance of Way Employees*, 646 F. Supp. 367 (D. Me. 1986).[4] The current motions, however, place the constitutional merits of the Second Act squarely before the Court.

II. THE ISSUES

The Railroad makes the following five arguments in support of its contention that the Second Act is unconstitutional: one, the Second Act violates the equal protection component of the fifth amendment because Congress had no compelling justification to enact such legislation against a discrete and politically powerless class of one[5] and because less restrictive means were available to Congress than the means chosen; two, the Second Act violates the equal protection component of the fifth amendment because it is irrational, arbitrary, and

[4] The parties have completed the arbitration proceedings recommended by the Advisory Board and mandated by the Second Act. The arbitrators issued their award on October 30, 1986; it was filed in this Court on November 3, 1986. The Railroad has filed a petition to impeach this award, *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, Civil No. 86-0366-P, and a motion to stay the effectiveness of the award pending a decision on the merits, which the Court denied. *Id.*, 650 F. Supp. 615 (D. Me. 1986).

[5] The Court notes at the outset that the Second Act imposes burdens on a larger class than a "class of one." Although the Railroad must pay employees greater economic benefits than it did before the Second Act, the implementation of system protection maintenance crews also affects the BMWE members' prior employment rights. Cf. *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, No. 86-1875, slip op. at 10 n.6 (1st Cir. Mar. 10, 1987) (noting that First Act affected both Railroad and BMWE). The Court recognizes, however, that the size of any class depends on the means by which the class is defined. Rather than quibble about the actual specificity of the class affected by the Second Act, the Court proceeds on the basis that the Second Act imposes burdens on discrete classes and that the Railroad is the only employer forced to assume the specific economic burdens mandated therein.

did." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (explaining the scope of judicial inquiry into congressional exercise of its analogous powers under § 5 of the fourteenth amendment.) Similarly, under the equal protection component of the fifth amendment, regulation "'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* at 657 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1954)). Thus, the classifications used by Congress in economic regulation require nothing more than mere rationality unless they "affect fundamental rights" or "proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Classifications that are underinclusive, even to the point of specifying a class of one, are "not fatal to the validity of a law under the equal protection component of the Fifth Amendment." *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 471 n.33 (1977) (dictum).

If application of these familiar standards were all that the Court was called upon to do, it would find the Second Act constitutional. The express purpose of the Second Act is to preserve transportation services essential to the national interest which Congress found were threatened by the imminence of another resort to self-help by BMWE.[*] Preserving these transportation services by ending the dispute between the parties is a permissible alternative within the range of rational alternatives available to Congress. *Wilson v. New*, 243 U.S. 332, 351 (1917) (upholding constitutionality of congressional act that imposed eight-hour day and minimum wage rates between parties engaged in nationwide railroad dispute over wages); *Louisville & Nashville R.R. v. Bass*, 328 F. Supp. 732, 743 (W.D. Ky. 1971) (upholding constitutionality of congressional act that imposed a settlement on parties to nationwide railroad dispute); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, B. & Q.R.R.*, 225

[*] The Railroad has renewed its argument, offered in its prior motions to block the effects of this and previous congressional actions, that there was no justification for Congress's action because BMWE had not resorted to self-help despite two separate periods during which there was no statutory prohibition for such action. This Court had previously rejected this argument based on its finding that BMWE, "as it has asserted before this Court on many previous occasions, would clearly have called a strike in response to the Railroad's plan to implement its new rules." *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, 646 F. Supp. at 369. The Railroad has offered no additional factual support for its assertions, and the Court, therefore, has no basis upon which to question Congress's explicitly stated purpose and rationale.

F. Supp. 11, 23 (D.D.C.), *aff'd per curiam*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964) (upholding constitutionality of congressional act that mandated compulsory arbitration of issues underlying nationwide railroad dispute). Although the Railroad argues vigorously that other, more rational remedies were available to Congress, "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for [the Court] to review the congressional resolution of these factors." *Katzenbach*, 384 U.S. at 653. Similarly, the Court finds that, under the traditional analysis, the Railroad was a legitimate class of one, at the time of the legislation in question, only its labor dispute had ripened to the point that national transportation services were threatened. That other railroad disputes are now undergoing the same ripening process is irrelevant. Congress may direct its attention to only the most immediate problem confronting it. *Id.* at 657. In the ordinary case, the Court's inquiry would end here. The Court is persuaded, however, that this is not the ordinary case.

IV. HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

The Railroad makes several related arguments urging the Court to eschew the traditional equal protection analysis. It begins by distinguishing the line of cases that begins with *Wilson v. New*, *supra*, on the ground that none of these cases involves legislation directed at one individual railroad. The Railroad then offers two separate grounds upon which the Court might justify closer scrutiny of the congressional decision-making process.

First, the Railroad argues that the Supreme Court has traditionally applied heightened scrutiny to cases involving classes of one, citing *McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916); *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901); *Atchison, T. & S.F.R.R. v. Matthews*, 174 U.S. 96, 104 (1899) (dicta). These cases, however, represent nothing more than applications of the traditional "reasonable relationship" test during a period of history in which federal courts scrutinized more closely economic legislation enacted by the several states than would be the case today. That reasonable minds may have reached different conclusions regarding the rationality of state legislation in a different era should not control the Court's reasoning today in reviewing congressional

acts arising under the Commerce Clause. Moreover, the Sixth Circuit's reliance on *McFarland* in *Southwest Mall, Inc. v. Garner*, 455 F.2d 887 (6th Cir. 1972), does not offer the support that the Railroad would attribute to it. In that case, the court merely explained how a taxpayer might establish an equal protection violation by showing either a systematic pattern of discrimination or direct evidence of improper intention. *Id.* at 889. The court went on to hold, however, that the taxpayer had failed to show a discriminatory application of the property tax laws because there was a plausible explanation for the difference in treatment based on the uniqueness of the taxpayer's property. *Id.* at 892. The Railroad, however, has failed to appreciate the uniqueness of its own circumstances when Congress acted. The First Circuit, just a few weeks ago, highlighted this critical weakness in the Railroad's argument in the Circuit's decision rejecting the Railroad's similar challenge to the First Act. *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, No. 86-1875, slip op. at 13 n.7 (1st Cir. Mar. 10, 1987), *aff'g* No. 86-0263-P, slip op. (D. Me. Sept. 10, 1986). It is the unique circumstances surrounding the necessity of preventing a nationwide railroad strike that offers this Court the necessary plausible explanation for Congress's legislation directed solely at this Railroad. The Court refuses to adopt a rational basis test that departs from the mainstream of contemporary analysis.

The Railroad bases its second argument on Justice Stone's famous fourth footnote in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to he within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [*E.g.*,] restrictions upon the right to vote, . . . restraints upon the

> dissemination of information, . . . interferences with political organizations, . . . prohibition of peaceable assembly . . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4 (citations omitted). The Railroad argues that a class of one exemplifies the above-mentioned ability of the majority to tyrannize minority groups because a minority group of one cannot protect itself in the democratic political process. In the Railroad's eyes, it is David, a "small Maine railroad," facing Goliath, "a powerful and influential national labor organization." Plaintiffs' Memorandum of Law, at 24.

The Railroad has, in effect, collapsed the second and third paragraphs of Justice Stone's footnote into one test: courts must closely scrutinize legislation that exclusively affects a class that lacks the political power to repeal the undesirable legislation. The Court does not understand Justice Stone's concerns to have been so broad. Instead, these paragraphs identify two distinct problem areas. The first need not concern the Court in this case for it addresses restrictions on the political process itself. The second, however, cautions the Court to scrutinize carefully legislation that affects "discrete and insular minorities." The Railroad contends that it is such a politically powerless minority.

The Railroad's argument ignores, however, one important component of Justice Stone's test: he was concerned with *prejudice* against such minorities and not merely with minorities *per se*. As Professor Ely has so aptly demonstrated:

> In a sense the complainant in every case speaks for such a [discrete and insular minority]: he wouldn't be in court if the class in which the legislature had placed him had not been, on at least one occasion, a political minority (they lost), both

> discrete (they're the ones on the disfavored side of the statutory line) and insular (they couldn't gather enough allies to defeat the legislation). But obviously that isn't what Justice Stone meant. His reference was rather to the sort of "pluralist" wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests, and constituted an attempt to denote those minorities for which such a system of "mutual defense pacts" will prove recurrently unavailing.
>
> * * * *
>
> An added element is therefore needed, that the minority in question be one that is barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable. Standard renditions of what we think of as the *Carolene Products* approach . . . do not include this element: "discrete and insular minorities" are simply entitled to "heightened judicial solicitude." Justice Stone's original, however, was richer than this, indicating that "*prejudice against discrete and insular minorities* may be a special condition, which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ." "[P]rejudice, in short, provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society."

J. Ely, *Democracy and Distrust* 151-53 (1980) (emphasis in original). *Accord Nixon v. Administrator of Gen. Serv.*, 433 U.S. at 470-71 (rejecting similar overly broad argument under Bill of Attainder Clause).

The Court has no basis on which it might find that the Railroad is a discrete and insular minority incapable of influencing the political processes. In fact, just the opposite appears to be true. The Railroad is but one member of the larger class of all railroads, traditionally considered to be among the most powerful of economic enterprises, a class whose own future contract negotiations must proceed under the coercive force of possible congressional intervention and

imposition of similar economic burdens. The opportunity for coalition-building seems favorable, not unfavorable. The Railroad has not demonstrated, and indeed the Court believes it could not demonstrate, any basis upon which the Court might conclude that it has been the object of widespread prejudice as have been the groups traditionally recognized as suspect classes: racial and national minorities, women, aliens, and illegitimates. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Consequently, the Court must conclude that the Second Act does not include a suspect classification which would justify the Court's closer scrutiny of its rationale and result.

It is clear to the Court that the Railroad has devoted substantial energy to this line of argument in order to avoid the minimum rationality standards analyzed in Part III, *supra*. In doing so, the Railroad seeks to persuade the Court that a different view of equal protection must prevail in cases involving a class of one. It urges the Court to accept Justice Jackson's view of the proper limits of the equal protection clause:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

Unfortunately, Justice Jackson's view of the equal protection clause has never received modern acceptance. This Court likewise refuses to resurrect it. *Accord Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, No. 86-1875, slip op. at 16 (1st Cir. Mar. 10, 1987) (confining review of economic regulation under the equal protection clause to "the rational basis test"). Nevertheless, a failure under this line of analysis does not preclude further

review of this legislation. The Court finds that there is indeed a certain anomaly inherent in legislation that imposes burdens on a class of one. In the Court's view, this anomaly touches upon the fundamental principles underlying our representative form of government. Although Justice Jackson saw the equal protection clause as the best protection against "arbitrary and unreasonable government," this Court sees other provisions of the Constitution as offering similar protections. The Court, therefore, turns to the Railroad's arguments based on these other provisions, beginning with the separation-of-powers doctrine.

V. SEPARATION OF POWERS

"The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, U.S. , , 106 S. Ct. 3181, 3191 (1986). The historical development of what has come to be known as the separation-of-powers doctrine has been detailed elsewhere and need not be reiterated here. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 120-31 (1976); Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371 (1976). The Supreme Court has expressly adopted "the more pragmatic, flexible approach of Madison in the Federalist Papers" to the doctrine. *Nixon*, 433 U.S. at 442; *see generally* J. Madison, *The Federalist Nos. 47 & 51* (J. Cooke ed. 1961). Thus, the boundaries between Congress and the other branches are not precisely defined nor is a total separation of the three branches thought to be contemplated by the Constitution. *Buckley v. Valeo*, 424 U.S. at 121; *Springer v. Philippine Islands*, 277 U.S. 189, 209-10 (1928) (Holmes, J., dissenting). Nevertheless, "the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty" remains. *Bowsher*, U.S. at , 106 S. Ct. at 3186.

The Railroad argues that the congressional imposition of a labor contract on a single business is an unwonted denial of these basic protections. It relies on Chief Justice Marshall's familiar maxim that Congress should prescribe rules of general applicability; individualized application of these rules should be left to other branches or departments. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *see generally* L. Tribe, *American Constitutional Law* § 10-1 (1978). Under the Madisonian approach to separation of powers

and the facts of this case, the Court would restate Chief Justice Marshall's premise. It appears to the Court that the general rule is that Congress prescribes rules of general application; an exception arises when Congress prescribes a rule applicable to only one individual. Thus, the Court perceives the issues as: first, whether the exception itself is a violation of the separation-of-powers doctrine and second, if the exception does not violate this doctrine, whether any additional safeguards are required by the Constitution.

The Supreme Court has addressed the first issue in *INS v. Chadha*, 462 U.S. 919 (1983), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In neither case did the Supreme Court find that legislation applicable to only one individual was a *per se* violation of the separation-of-powers doctrine. Of these two, *Chadha* appears to bear great similarity to the present case as it also contained an allegation that Congress had impermissibly usurped judicial, as opposed to executive,[8] power.

In *Chadha*, the Supreme Court described three ways in which a court might identify the separate powers delegated to the three branches. One, these powers are "functionally identifiable." 462 U.S. at 951. Two, congressional actions are an exercise of legislative power if they are legislative in purpose and effect. *Id.* at 952. Finally, congressional acts cannot be judicial acts if the subject matter of the act does not encompass a justiciable case or controversy within the meaning of Article III. *Id.* at 957 n.22.

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[8] A large number of separation-of-powers cases have involved conflicts between the legislative and executive branches. *See, e.g., Bowsher v. Synar*, U.S. , 106 S. Ct. 3181 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Springer v. Philippine Islands*, 277 U.S. 189 (1928); *Myers v. United States*, 272 U.S. 52 (1926). Although the Court, on its own initiative, has considered these cases, it focuses its analysis more closely on cases in which the alleged conflict has involved the judicial branch. *See, e.g., Chadha, supra; United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Watkins v. United States*, 354 U.S. 178 (1957); *In re Debs*, 158 U.S. 564 (1895); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). The Court has also reviewed those cases based on the prohibition against bills of attainder. *See, e.g., Nixon, supra; United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946). As this last ground has not been raised by the parties, the Court does not address it further.

This Court can draw no firm guidance from *Chadha's* "functionally identifiable" language. As Justice Brandeis noted over a half century ago, each branch of government has the "power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Myers v. United States*, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting). And as the Supreme Court noted just recently, a particular function will take on the aspects of the branch to which it is assigned; thus, the power exercised by Congress may have a "chameleon-like quality." *Bowsher*, U.S. at , 106 S. Ct. at 3201 (Stevens, J., concurring).

Turning, however, to the "purpose and effect language," the Court finds that the Second Act has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch." *Chadha*, 462 U.S. at 952. This purpose and effect is legislative. *Id.*; *see also Springer v. Philippine Islands*, 277 U.S. 189, 210 (Holmes, J., dissenting) ("To make a rule of conduct applicable to an *individual* who but for such action would be free from it is to legislate . . . .") (emphasis added). *See also Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees*, No. 86-1875, slip op. at 19-20 (1st Cir. Mar. 10, 1986).

Finally, although the Railroad argues that Congress improperly adjudicated the rights of the parties, it is clear to the Court that no justiciable case or controversy existed between the Railroad and the BMWE once the parties could again resort to self-help. When Congress enacted the Railway Labor Act, it set up a system that resolved railroad labor disputes through arbitration, mediation, and conciliation. Once, however, the parties had exhausted the procedures mandated by the Act, they were free to resort to self-help subject to only the influence of public opinion arising from the recommendations of the emergency board created by the President. *See generally* H. Lustgarten, *Principles of Railroad & Airline Labor Law* 1-13 (1984). At that time, however, neither party had any rights under the Act that this Court could enforce. Nor does this Court have the power to fashion its own resolution of the dispute. As there was no remedy available under the Act, the only path to settlement, absent a voluntary agreement of the parties, was indirect enforcement of the *goals* of the Act through the enactment of new legislation by Congress. *See Bowsher*, U.S. at , 106 S. Ct. at 3192; *Chadha*, 462 U.S. at 958. Congress did precisely this when it enacted the

Second Act. That it chose to impose a settlement on the parties to the dispute instead of prohibiting secondary picketing[9], as the Railroad would have preferred, does not transform the congressional act from a legislative to a judicial one.

Having considered all three tests articulated by the *Chadha* majority, the Court finds that the Second Act is clearly legislative in purpose and effect and does not encroach upon the judicial powers reserved to the courts by Article Three. Consequently, the Court finds that the Second Act does not violate the separation-of-powers doctrine. In light of this finding, the Court now reaches the second issue, an issue the Supreme Court did not reach in *Chadha* and the First Circuit did not reach in its review of the First Act: whether additional safeguards are required when legislation singles out one individual for special burdens.[10] *Cf. Chadha*, 462 U.S. at 954 n.17; *Maine Cent. R.R.*, No. 86-1875, slip op. at 20-21 (1st Cir. Mar. 10, 1987) (finding that the First Act did not realign the parties' rights but merely extended the statutory scheme then in effect).

The Court begins its inquiry by noting the one theme which consistently recurs in those cases that consider the constitutionality of legislation aimed at a class of one: a persistent fear that such legislation might expose the individual to "the tyranny of a shifting majority." *Id.* at 966 (Powell, J., concurring); *accord Nixon*, 433 U.S. at 485-86 (Stevens, J., concurring); *McFarland*, 241 U.S. at 86; *Cotting*, 183 U.S. at 105-12; *Atchison*, 174 U.S. at 104-05; *Maine Cent. R.R.*, No. 86-1875, slip op. at 20-21 (1st Cir. Mar. 10, 1987). *See*

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[9] Recently, five Circuit Courts of Appeals have found that the Railway Labor Act does not prohibit secondary picketing. *See Brotherhood of Maintenance of Way Employees v. Guilford Transp. Indus.*, 803 F.2d 1228 (1st Cir. 1986); *Norfolk & Western Ry. v. Brotherhood of Maintenance of Way Employees*, 795 F.2d 1169 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3115 (U.S. Aug. 19, 1986) (No. 86-175); *Richmond, F. & P.R.R. v. Brotherhood of Maintenance of Way Employees*, 795 F.2d 1161 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3259 (U.S. Oct. 14, 1986) (No. 86-503); *Central Vermont Ry. v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 1298 (D.C. Cir. 1986); *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 795 (7th Cir. 1986), *cert. dismissed*, 106 S. Ct. 2911 (1986); *Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees*, 792 F.2d 303 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3175 (U.S. Sept. 23, 1986) (No. 86-353).

[10] The Supreme Court did reach this question in *Nixon*, *supra*, but found no independent constitutional violation in that case. Differences between *Nixon* and the present case, however, preclude close comparison of the two or reliance on that Court's ultimate conclusion.

generally Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984). Justice Powell would ground this concern in the separation-of-powers doctrine itself: such legislation "raises the dangers the Framers sought to avoid." *Chadha*, 462 U.S. at 964 n.7 (Powell, J., concurring).

The critical danger, however, is not necessarily that Congress will perform a function not within its sphere. Instead, it is that if Congress performs such a function, it will do so without the checks that inure to the more traditional performance of that function. Justice Powell's concurrence in *Chadha* expressly recognizes this aspect of the danger: "Congress is not bound by established substantive rules. Nor is it subject to the procedural safeguards . . . that are present when a court or an agency adjudicates rights." *Id.* at 966 (footnote omitted). Similarly, the Court in *Nixon* considered the procedural due process aspects of the Act it was reviewing as one factor supporting its constitutionality: the Act afforded President Nixon "all of the protections that inhere in a judicial proceeding" before the confiscation of his property would become permanent. 433 U.S. at 481-82.

If this discussion is reminiscent of the equal protection analysis in Part IV, *supra*, it is because the same fundamental values underlie the separation-of-powers doctrine and the equal protection clause as well as the due process clause and various other constitutional constraints. All of these are but alternative methods of ensuring that government remains accountable for its actions: they prevent, at the very least, arbitrary governmental action. Sunstein, *supra*, 84 Colum. L. Rev. at 1689-93.

Most of the Railroad's arguments focus on what it perceives to be the actual arbitrariness of the Second Act. In fact, these arguments are grounded in concerns most commonly labeled "due process" considerations. For instance, the Railroad raises such traditional procedural due process concerns as surprise, lack of notice, and lack of an opportunity to be heard. In addition, the Railroad pursues a substantive due process claim: it contends that the only rational choice available to Congress was to prohibit secondary picketing. Although the Railroad freely intermingles the two arguments, the prudent approach is to maintain the distinction between them. The Court is well aware that the "translation of substantive claims into procedural ones is an obviously attractive device for inducing review." Mashaw, *Constitutional Deregulation: Notes Toward a Public,*

Public Law, 54 Tulane L. Rev. 849, 862 (1980). The Court has, however, reviewed the Second Act on substantive due process grounds and has found the congressional choice to be rational. *See infra*, Part III. The Court will not reopen this line of inquiry simply because it has been recast as a procedural challenge. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 104-09 (1978) (refusing to accept plaintiff's characterization of its claim as a procedural due process challenge).

Nevertheless, the Court finds that the Railroad's procedural due process arguments strike at the heart of the matter: as government focuses its attention on specific individuals and imposes burdens on them, it must necessarily afford those individuals some opportunity to participate in a meaningful manner. *See generally* 1 Tribe, *supra*, at 477, 501; *accord* Levi, *supra*, 76 Colum. L. Rev. at 385. This is not to say that the Court adopts a "due process in lawmaking" theory. *See Fullilove v. Klutznick*, 448 U.S. 448, 549 & n.24 (1980) (Stevens, J., dissenting); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 98 & n.11 (1977) (Stevens, J., dissenting) (both citing other authorities). Nor does the Court wish to prescribe the procedural format that should be followed. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542-43 (1978) (limiting the courts' review of agency procedures to "quasi-judicial" determinations affecting persons on an individual basis) (dicta). Instead, the Court finds that, in reviewing the extremely exceptional circumstance of congressional economic regulation that imposes burdens solely on one entity within an entire industry, the Court is obligated under the Constitution to evaluate whether Congress has provided the necessary safeguards to prevent the *unchecked* exercise of raw political power. *Cf.* Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 593 (1953) (discussing the role of checks on undue concentration of power between the executive and legislative branches). Furthermore, the Court finds that this evaluation is best made in terms of procedural due process. *See* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L.J. 319, 358 (1957) ("[T]he common objections to an enlarged judicial review lose much of their persuasiveness, however, where the challenge is not to remake substantive policy, but to supervise the procedures through which laws are

enforced upon individuals") (footnote omitted). The Court, therefore, turns to a consideration of the due process safeguards attendant to the Second Act.

VI. PROCEDURAL DUE PROCESS

The Railroad presents the following procedural due process arguments. One, it contends it had no opportunity to present its side of the dispute to Congress. Two, Congress acted without hearing, debates, recorded vote, a printed copy of the Act, or a published copy of the House Report. Three, it had no notice that the proceedings before Emergency Board No. 209 would be made retroactively binding. Finally, it had no notice that protection payments would be retroactively required when it furloughed employees no longer needed due to business losses from the previous BMWE strike. All of these defects, in the Railroad's view, have culminated in the imposition upon it of the most expensive railroad contract in the nation with labor protection provisions that a subsequent Emergency Board found to be unwarranted and anti-competitive on a nationwide basis, Report to the President by Emergency Board No. 211, Aug. 14, 1986, at 37—a contract that the Railroad maintains is merely an arbitrary response to intense lobbying efforts.

The analytical path that the Court must take in evaluating the Railroad's contentions was established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Eldridge test

> requires the consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Court begins, as did the *Eldridge* Court, *id.*, with a description of the procedures actually used.

The Second Act afforded the Railroad some procedural safeguards at three distinct junctures: one, in the proceedings before Emergency

Board No. 209; two, in the proceedings before the congressional advisory board and special committee; and three, during the arbitration proceedings mandated by the Act to resolve the issues surrounding its implementation. The Court focuses its attention first on the proceedings before the Emergency Board.[11]

The record indicates that formal hearings were held during which the Railroad, represented by counsel, was "given full opportunity to present oral testimony, documentary evidence and argument in support of [its position]." Report to the President by Emergency Board No. 209, June 20, 1986, at 3. These, of course, are the traditional safeguards of the adversarial system. In addition, the proceedings took place before an impartial tribunal appointed by the President. Moreover, the Court's careful review of the Report indicates that the Railroad presented the full scope of its concerns, including its position regarding secondary picketing and its financial and competitive position after the aborted BMWE strike, to the Emergency Board. There appears to be no basis upon which the Railroad could contend that the proceedings lacked the necessary procedural safeguards.

The record is less clear regarding the proceedings before the congressional advisory board. The Railroad's exhibits reveal, however, that it presented its policy arguments both to this board and to the House Subcommittee on Commerce, Transportation and Tourism. The Railroad does not argue that it was not allowed full opportunity to submit its views to either body.

Ordinarily, the Constitution does not require Congress to use facts to support its legislative choices.[12] Pilchen, *Politics v. The Cloister:*

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[11] The Court finds no reason at this time to address the adequacy of the due process safeguards required in the subsequent arbitration. First, the Court will review that proceeding, including several due process challenges, in a separate action, *Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employes*, Civil No. 86-0360-P. Second, the Railroad's central argument in the present action is clearly focused on the substantive policy choice made by Congress and the Railroad's alleged lack of an adequate opportunity to affect that choice. With this focus, the post-deprivation procedures lose much of their significance. The Court does not imply, however, that under different circumstances or in light of a different challenge, post-deprivation procedures might not be central. *Cf. Nixon*, 433 U.S. at 481-82.

[12] There is also no constitutional requirement that Congress hold hearings, debate, or a recorded vote in order to pass legislation. *See* U.S. Const. Art. I, §§ 1, 5, 7. *Cf. Chadha*, 462 U.S. at 926-27 (unprinted and uncirculated resolution passed without debate or recorded vote).

Deciding When The Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments, 59 Notre Dame L. Rev. 337, 363 n.168 (1984); Davis, *Facts in Lawmaking*, 80 Colum. L. Rev. 931, 932 (1980). This Court determines, however, that this case, involving as it does burdens imposed on a class of one, represents the exception to that general rule. The Railroad's protection from Congress's use of raw political power lies precisely in there being a nexus between the facts of the dispute, as developed with the Railroad's participation, and the ultimate congressional action.

The Court, moreover, is persuaded that the necessary nexus exists. The opportunity to develop the factual record existed before the Emergency Board where the Railroad received full procedural protections. The Emergency Board issued a Report in which it set forth these facts in detail and stated the relation between the facts and its recommendations. Congress accepted[13] the Emergency Board's recommendations and enacted them without change. Thus, it is clear to the Court that Congress responded to the factual dispute, as analyzed by the Emergency Board, and acted in accordance with those independent recommendations generated by the factual record. In this light, the Railroad's charge that the Second Act is merely a congressional response to superior political pressure loses its persuasive force.

Turning now to the test articulated in *Eldridge*, the Court begins by noting that the railroad industry has long been one of the most heavily regulated industries in our nation. The Railroad's membership in such a public business necessarily subjects its interests to congressional regulation, with the limitation that its property cannot be destroyed through confiscation. *Wilson v. New*, 243 U.S. at 349. Because the Railroad clearly does not have an unfettered interest in its business activities, at least until Congress decides to change the regulatory policies of the Railway Labor Act, it is difficult for the Court to be persuaded that additional procedural safeguards would in this case reduce the risk of an erroneous result. There seems to be little point in requiring the parties to undertake the expense and

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[13] The Court offers no opinion regarding the additional safeguards that might be necessary if Congress did not accept the recommendations of the Emergency Board. *Cf. Chadha*, *supra*.

burdens of repeating the process already completed before the Emergency Board. Due process has never meant that adversaries are entitled to successive forums in the hopes of changing the factual determinations made in the first instance. Consequently, the Court finds that the procedural safeguards attendant to the Second Act were adequate.

Recognizing perhaps that it was afforded a full panoply of procedural due process protections[14] before the Emergency Board, the

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[14] The Railroad also contends that it had no notice that the proceedings before the Emergency Board would be made retroactively binding. The Court finds that this contention is without merit. First, the Railroad had actual notice regarding the nature and scope of the proceedings before the Emergency Board. The Railroad was also aware of the temporal significance of the Emergency Board's recommendations. Although it is true that those recommendations were not at the time binding, they did represent the final opportunity for impartial evaluation of the dispute under the Railway Labor Act. Moreover, the Chairman of the Railroad's parent company explicitly acknowledged that once a strike threatens "the actual interruption of the flow of commerce, Congress has traditionally intervened." *Hearing on H.R.J. 683, Subcomm. on Commerce, Transp. & Tourism of the House Comm. on Energy & Commerce*, 99th Cong., 2d Sess. (1986) (Statement of Timothy Mellon, Chairman, Guilford Transportation Industries, at 5). In at least one other instance, this congressional intervention has been through the imposition of the recommendations of a Presidential Emergency Board. Pub. L. 97-262, 96 Stat. 1130 (1982). Thus, the Railroad clearly had constructive, if not actual, notice that the recommendations of Emergency Board No. 209 could become binding unless the parties reached an independent agreement. Furthermore, the Railroad does not argue that it lacked the incentive to present its claims to the Emergency Board. Indeed, the Report itself reveals that the Railroad pressed all of its factual and policy positions. Finally, the recommendations of the Emergency Board were not given *res judicata* or collateral estoppel effect. Instead, Congress evaluated these recommendations and considered the input of both the Railroad and BMWE. Under these circumstances, the Court perceives no prejudice to the Railroad's opportunity to be heard by Congress's later acceptance of the Emergency Board's recommendations.

Equally unpersuasive is the Railroad's contention that it had no notice that protection payments would be retroactively required when it furloughed those employees no longer needed due to the business losses caused by the strike. Clearly, the issue of protective payments was central to the dispute then underway. The imposition of a solution limited to the current dispute can hardly be called retroactive. Even if these economic burdens are so characterized, they are permissible under the due process clause where the action affected is among those actions that motivated the legislation. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 701-02 (1960). This is particularly true where Congress imposes retroactive economic burdens that are justified by a rational legislative purpose. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730-31 (1984). *Cf. Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 17 & n.16 (employers' knowledge of possible liabilities and their reliance on current law are factors to be considered in evaluating retrospective economic burdens).

Railroad argues, in effect, that these protections were afforded before the wrong forum — the correct forum allegedly being Congress itself. At the same time, however, the Railroad argues that it "cannot possibly make its voice heard in the national political arena." Plaintiffs' Memorandum of Law, at 38. The Railroad presents this conundrum to illustrate what it sees as the fundamental problem inherent in the Second Act.

The Court need not become entangled in extended analysis of this conundrum in order to point out its basic flaw. The conundrum merely illustrates the futility of attempting to use procedural due process arguments to effect heightened substantive due process review. The Railroad's concerns with due process do not center on its opportunity to be heard with regard to any adjudicable factual dispute. The scope of the process afforded the Railroad before the Emergency Board and the detailed Report of that Board compel the conclusion that the facts surrounding the dispute have been fully developed. Instead, the Railroad's concerns center on its ability to affect the ultimate policy choice between a decision to allow the Railroad to go forward with its plans, albeit with increased labor costs to the Railroad, and a decision to restrict the coercive power of BMWE to primary picketing which would in effect allow the Railroad to reorganize its workforce without incurring additional labor costs. This policy choice is, however, not reviewable unless it is not supported by a factual record. The Railroad had a full opportunity to develop an evidentiary record of contrary thrust. The focus, therefore, of the Court's inquiry is merely whether the Railroad had an opportunity to be heard in a setting in which its evidence could be received and evaluated impartially and whether this record formed the basis for Congress's subsequent action. Thus, there is a conundrum only if the Court allows itself to be led to the substantive conclusion via the procedural path. The Court, however, is convinced that the substantive result cannot be reached unless Congress ignored the factual record. Congress clearly did not do so in this case. Therefore, the Court holds that the Second Act does not raise the dangers the Framers sought to avoid; although the Second Act imposes burdens on only one entity in an entire industry, those burdens are based on a factual record in the development of which that entity had a full opportunity for meaningful participation.

VII. DELEGATION

The Railroad bases its final challenge to the Second Act on what it perceives to be the complete absence of standards by which the arbitrator was to determine the "unresolved implementing issues" involved in transforming the recommendations of Emergency Board No. 209 into a contract between the parties. The Railroad puts forth two arguments in support of this challenge.

First, the Railroad compares the Second Act with Public Law 88-108, 77 Stat. 132 (1963), which was upheld in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, B. & Q.R.R.*, 225 F. Supp. 11 (D.D.C.), *aff'd per curiam*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964). The Railroad concludes that the differences between the two acts compel a finding that the Second Act lacks adequate standards. The Court disagrees. The Act upheld by the District of Columbia court did not impose the recommendations of an emergency board upon the parties to that dispute. Instead, it ordered the creation of an arbitration board to pass on two as yet unresolved major issues between the parties. 225 F. Supp. at 15. Thus, in that case, Congress delegated its legislative power to create a solution to the dispute. *Id.* at 22. The standards that the court found adequate in that case do not necessarily set the minimum standards that should be controlling here.

Even if the Court were to rely on those standards, it does not find significant differences. Both acts set a standard with respect to the maintenance of public transportation. The 1963 Act also included standards relating to the interests of both the carrier and the employees and to the prior progress made through bargaining and mediation. *Id.* at 23. These standards were, of course, germane to the actual dispute.

Similarly, the Second Act specifically refers to the report and recommendations of Emergency Board No. 209 as defining the basis for the unresolved implementing issues that were to be arbitrated in the present dispute. This reference sufficiently defines the scope of the arbitration. In addition, the recommendations themselves provide the following standards: one, job protection payments should be provided for employees who were "currently active" as of March 3, 1986; two, the parties should agree to system seniority for production work "similar to those agreements negotiated on the Boston &

Maine and the Delaware & Hudson rail lines of the Guilford System" with a per diem allowance "not less than that which is currently paid to maintenance of way employees" in the Guilford system; three, changes in rates of pay and health and welfare programs should be governed by the results of national negotiations; four, changes in local rules and working conditions should be addressed under the Railway Labor Act "up to but not including mandatory arbitration or resort to self-help." Moreover, the Second Act provides that section 7 of the Railway Labor Act should control the actual arbitration. By bringing the arbitration within the Railway Labor Act, Congress clearly provided adequate standards for the conduct of the arbitration. Finally, because binding arbitration is an explicit, albeit usually voluntary, provision of the Railway Labor Act, 45 U.S.C. § 157, the standards for the present mandatory arbitration may be derived from the Railway Labor Act itself. When these standards are combined with the factual background of the current dispute and the recommendations of Emergency Board No. 209, both of which arose from the Railway Labor Act, the Court finds that Congress has provided sufficient standards for this arbitration.[15]

In its second argument, the Railroad asks the Court to adopt the reasoning of the Southern District of New York, which recently implied that standardless delegation of power to arbitrators would violate the nondelegation doctrine. *See Union Carbide Agric. Prod. v. Ruckleshaus*, 571 F. Supp. 117, 124 (S.D.N.Y. 1983) (*dicta*), *rev'd on other grounds sub nom. Thomas v. Union Carbide Agric. Prod.*, 105 S. Ct. 3325 (1985). *Contra PPG Indus. v. Stauffer Chem. Co.*, 637 F. Supp. 85, 89 (D.D.C. 1986). The Court, however, does not reach this argument as it has found that the Second act is far from standardless. The Court notes, however, that the Supreme Court in *Union Carbide*, in remanding the delegation issue, specifically explained that even if a particular delegation appears standardless, the court might derive the necessary standard from the purpose, legislative history, or factual background of the act in question. 105 S. Ct. at 3339-40. Consequently, the Court is unpersuaded that the above result would be different if it were to reach this argument.

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[15] The Railroad also argues that the arbitrator exceeded these "purported" standards, which to the Railroad illustrates the inadequacy of the standards themselves. This argument, however, should be made in the Railroad's challenge to the award itself.

VIII. NATIONAL MEDIATION BOARD

Defendant National Mediation Board (the Board) requests dismissal of the Railroad's claims against the Board contending that no justiciable controversy exists between itself and the Railroad. The Court agrees and dismisses the Railroad's complaint against the Board. Fed. R. Civ. P. 12(b)(6).

The Board bases its argument on *Ozark Air Lines v. National Mediation Board*, 797 F.2d 557 (8th Cir. 1986), which held that the Board was not a proper party to a dispute where its only role was to appoint an arbitrator. *Id.* at 563. *Accord Radin v. United States*, 699 F.2d 681, 686 (4th Cir. 1983) (citing cases that apply similar reasoning in dismissing suits against National Railroad Adjustment Board). The Court finds the reasoning in *Ozark* to be persuasive.

Even if the Court were to reject the justiciability and policy concerns detailed in the *Ozark* opinion, it finds that any possible previous controversy between the Railroad and the Board is now moot. The Court finds that the sole function of the Board under the Second Act was to appoint an arbitrator to resolve the implementing issues. The Board has fulfilled this function, and the arbitrator has completed his task. Consequently, it appears that the Court can no longer grant the Railroad any of the relief it has requested against the Board. Such changed circumstances can render a once viable controversy moot. *See C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, § 3533.3* (1984).

The Railroad attempts to distinguish *Ozark* and the grounds for that court's decision by arguing that the Board will necessarily be involved in the continuing enforcement of the Second Act: it will be bound by the Second Act and *may* use the Second Act as a basis to refuse a request for mediation services. In essence, the Railroad sees the Board as equivalent to a federal agency or a body of federal officers. It consequently relies on *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949), to support its argument that the Board is a proper party to this action. The Court finds the Railroad's arguments unpersuasive. Any role that the Board might play in the continued enforcement of the Second Act is speculative at this point and is, therefore, too indefinite to constitute a present controversy between the parties. *Cf. Division 580, Amalgamated Transit Union v. Central New York Regional Transp. Auth.*, 578 F.2d 29,

32-33 (2d Cir. 1978) (finding issue moot where continued involvement in controversy was contingent on the parties' continuing inability to agree). Arbitration boards, unlike federal regulatory agencies, lack the ongoing interest in their decisions which otherwise justify the inclusion of such agencies as parties. *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980). *Larson* is, therefore, inapposite.

IX. CONCLUSION AND ORDER

For the reasons detailed above, the Court finds that the Second Act, Pub. L. 99-431, 100 Stat. 987 (Sept. 30, 1986), is constitutional. The Court, therefore *GRANTS* Defendant BMWE's Motion for Summary Judgment. In addition, the Court finds no justiciable controversy as to Defendant National Mediation Board and therefore *GRANTS* Defendant's Motion to Dismiss.

SO ORDERED.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, this 31st day of March, 1987

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE MAINE CENTRAL RAILROAD COMPANY and THE PORTLAND TERMINAL COMPANY,	)	
Plaintiffs	)	
v.	)	CIVIL NO. 86-0311 P
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES and NATIONAL MEDIATION BOARD,	)	
Defendants		

JUDGMENT

In accordance with the Opinion and Order, Carter, J., dated March 31, 1987, JUDGMENT is hereby entered on the merits for the defendant, Brotherhood of Maintenance of Way Employes, and against the plaintiffs, The Maine Central Railroad Company and The Portland Terminal Company.

FURTHER, the Court having found no justiciable controversy as to defendant, National Mediation Board, it is ADJUDGED that the within action is dismissed as to said defendant, National Mediation Board.

Dated at Portland, Maine, this 3rd day of April, 1987.

/s/ W.S. Brownell
Clerk, United States District Court